04-1225

Supreme Court, U.S.
FILED
MAR 9 - 2005
OFFICE OF THE CLERK

No.

# In the Supreme Court of the United States

STEPHEN S. ADAMS AND 14,302 OTHER SIMILARLY SITUATED PLAINTIFFS,

PETITIONERS,

v.

UNITED STATES,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Whether the federal government can withhold and confiscate the wages that it owes its employees, for work already performed, without paying just compensation under the Takings Clause.

(2) Whether monetary obligations of the United States qualify as property protected by the Takings Clause.

(3) Whether legislation retroactively abrogating federal employees' meritorious wage claims against the United States for work already performed violates the Due Process Clause.

## LIST OF PARTIES

Petitioners are Stephen S. Adams and 14,302 individuals who are current and former employees of the United States. The names of all petitioners were filed with the Court of Federal Claims as part of the record submitted when the case was transferred from the United States District Court for the District of Columbia. Upon consultation with the clerk's office of this Court, petitioners do not list each petitioner's name. Should the Court require such information, petitioners will provide it forthwith.

The respondents are the United States of America, United States General Accounting Office (now called the "Government Accountability Office"), Richard J. Watkins (Assistant Director, Bureau of Alcohol, Tobacco, and Firearms), the Bureau of Tobacco, Alcohol and Firearms, Retha M. Fulmore (Deputy Assistant Administrator, Office of Personnel, Drug Enforcement Administration), the Drug Enforcement Agency, Darlene Berthod (National Director of Personnel, Internal Revenue Service), the Internal Revenue Service, John P. Helm (Assistant Chief Counsel (Administration), United States Customs Service), the United States Customs Service, Susan T. Tracey (Chief, Personnel Division, United States Secret Service), the United States Secret Service), the United States Department of Justice, the United States Department of the Treasury, and the Office of Personnel Management.

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## OPINIONS BELOW

The decision of the District Court for the District of Columbia is reported at 946 F. Supp. 37. Pet. App. 74a-90a. The District Court's denial of petitioners' motion for reconsideration is unpublished. Pet. App. 65a-73a. The D.C. Circuit's opinion is reported at 154 F.3d 420. Pet. App. 54a-64a; its denial of the petition for rehearing en banc is unpublished. Pet. App. 54a. The District Court's order transferring the remaining claims to the Court of Federal Claims is unpublished. Pet. App. 52a-53a.

The Court of Federal Claims' opinion is unpublished. Pet. App. 25a-51a. The Federal Circuit's opinion is reported at 391 F.3d 1212. Pet. App. 1a-24a.

## JURISDICTION

The Federal Circuit issued its opinion on December 9, 2004, resolving the Takings issues in this case. Pet. App. 1a-24a. This Court has jurisdiction under 28 U.S.C. § 1254(1). The Due Process issues in this case were decided earlier by the D.C. Circuit. This Court has jurisdiction over those issues as well because an otherwise timely petition for certiorari may raise any issues decided earlier in the case. *See, e.g., Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (*per curiam*).

The circumstance that this case was transferred to the Court of Federal Claims to resolve the Takings claims should not affect this Court's power to review the constitutional issues decided by both Circuits. But this Court's rules do not indicate whether the appropriate procedure is to file a separate petition to the D.C. Circuit on the Due Process issues, or instead to include both the Takings and Due Process issues in this one. After consulting with the Clerk's Office, and out of an abundance of caution, petitioners have done both.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the provisions of the Fifth Amendment, of Section 640 of the 1995 Treasury, Postal

Service and General Government Appropriations Act, Pub. L. No. 103-329, 108 Stat. 2382, 2432 (1994), and of Public Law No. 104-52, 109 Stat. 468, 468–69 (1995), involved in this case. Pet. App. 91a-92a.

## STATEMENT OF THE CASE

In the years since this Court's divided 4-4-1 decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Federal Circuit has developed a new Takings jurisprudence under which money and monetary obligations are almost never considered property. That jurisprudence led the Federal Circuit to hold here that the wages owed by the United States to its employees, for work already performed, are not property and may be withheld, and confiscated for the government's own use, without compensation.

That is a profound and far-reaching error. The federal government employs nearly four million military and civilian employees,[1] none of whom now have an enforceable right to the wages they are owed for work they have already performed. More broadly, the Federal Circuit's reasoning suggests that anyone who does business with the United States on terms set by statute is essentially at the government's mercy, and that whether the government will honor its side of a bargain *for goods or labor it has already accepted* is just a matter of legislative grace. That cannot be the law. This Court consistently has held that the Takings Clause requires the United States to stand behind its financial obligations. And it squarely has held that States cannot nullify the wages owed to State employees for work already performed. There is no coherent reason to give the earned wages of federal employees any less protection.

Petitioners are 14,303 federal law enforcement officers and other federal employees who worked for the United

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[1] Recent government estimates are 1,426,836 active duty military employees (*see* http://web1.whs.osd.mil/mmid/M05/hst0409.pdf (last visited February 25, 2005)), and 2,457,785 civilian employees (*see* http://www.opm.gov/feddata/html/2004/september/table1.asp (last visited February 25, 2005)).

States in exchange for wages promised them by the statutes governing their employment. On November 18, 1995, petitioners had valid administrative claims pending against the United States to collect overtime pay it owed them, but had unlawfully refused to pay. The next day the United States abrogated those debts by enacting a statute that retroactively shortened the statute of limitations and time-barred their claims. That was a Taking of petitioners' property for which compensation remains due.

Petitioners originally brought challenges under both the Takings and Due Process Clauses in the District Court for the District of Columbia. The D.C. Circuit rejected their Due Process claim on the merits but held that it lacked jurisdiction over the Takings issues, and the case was transferred to the Court of Federal Claims ("COFC"). Because *Eastern Enterprises* creates doubt about the interplay between the two Clauses, this Court should grant review of the Due Process issues as well.

**1. Factual Background**

Because the Federal Circuit affirmed the COFC's grant of the United States' motion to dismiss, the allegations of the complaint, summarized below, must be accepted as true.

In 1974, Congress extended the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 ("FLSA"), to the federal government, expressing its conviction that when the United States acts as an employer it should generally be bound by the same regime it imposes on private sector employers.[2] The government thereafter resisted that mandate by adopting a broad interpretation of the statutory exemptions for "bona fide executive, administrative, or professional" employees (*see* 29 U.S.C. § 213(a)(1)) to deny FLSA overtime pay to large classes of federal employees. After years of litigation it is now clear that the United States' position was, in large measure, unlawful—and that

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[2] *See* Pub. L. No. 93-259, 88 Stat. 55, 58–62 (1974) (pertinent part codified at 29 U.S.C. § 203(e)(2)(A) (1988)); S. Rep. No. 93-690, at 1–2 (1974); H.R. Rep. No. 93-913, at 9 (1974), 1974 U.S.C.C.A.N. 2811, 2819.

many of its employees, including petitioners, were wrongly deprived of overtime compensation they were entitled to.[3]

Petitioners worked as criminal investigators and in other positions for the United States Secret Service, the United States Customs Service, the Bureau of Alcohol, Tobacco and Firearms, the Drug Enforcement Administration, the Internal Revenue Service, and other federal agencies. For many years, the United States failed to pay them the overtime compensation they were due, because it erroneously classified them as FLSA-exempt.

Commencing February 1990, petitioners filed administrative claims with the General Accounting Office ("GAO") to recover the back overtime compensation that the United States owed them. Consistent GAO and Office of Personnel Management ("OPM") precedent stretching back to 1978 established that the Barring Act's six-year statute of limitations governed petitioners' administrative claims.[4] Because a separate FLSA claim accrues each pay period, petitioners expected to recover six years of back overtime pay through GAO's administrative process. Petitioners also simultaneously filed actions in the COFC, which were consolidated and styled *Adams v. United States*, No. 90-162C, and consolidated cases ("*Adams I*"). The statute of limitations applicable to those judicial claims was two years, or three years if the violations were willful. 29 U.S.C. § 255(a). GAO stayed petitioners' administrative claims

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[3] *See, e.g., Adams v. United States*, 27 Fed. Cl. 5 (1992), *rev'd in part and remanded*, 178 F.3d 1306, 1998 WL 804552 (Fed. Cir. 1998) (unpublished decision); *Berg v. Newman*, 982 F.2d 500 (Fed. Cir. 1992), *on remand sub nom. Berg v. United States*, 49 Fed. Cl. 459, 478 (2001) (finding that the United States "has not carried its burden of demonstrating that the plaintiffs were exempt from the overtime pay provisions of the [FLSA]"); *Am. Fed'n of Gov't Employees v. Office of Personnel Mgmt.*, 821 F.2d 761, 769–71 (D.C. Cir. 1987).

[4] *See, e.g., In re Transp. Sys. Ctr.*, 57 Comp. Gen. 441 (1978); *see also In re Tomkowiak*, 67 Comp. Gen. 247 (1988); *In re Fed. Firefighters*, 68 Comp. Gen. 681 (1989); *accord* Federal Personnel Manual ("FPM") Letter 551-15 (1978) (announcing OPM's adoption of six-year limitations period).

pending the outcome of the *Adams I* litigation in the COFC. Petitioners' First Amended Complaint ("Complaint") ¶ 11, JA25.[5]

On cross-motions for summary judgment in late 1992, the COFC held that the GS-9 and GS-11 criminal investigators at all of the above-listed agencies and the GS-12 investigators at the Customs Service, were non-exempt and therefore entitled to recover back wages under the FLSA. *Adams v. United States*, 27 Fed. Cl. 5, 28–29 (1992). The COFC held that the GS-13 criminal investigators, and the GS-12 criminal investigators at every agency except the Customs Service, were FLSA-exempt. *Id.* at 29. The Federal Circuit vacated the latter ruling, see *Adams v. United States*, 178 F.3d 1306, 1998 WL 804552 (Fed. Cir. 1998) (unpublished decision), and remanded to the COFC.[6]

In March 1994, the Justice Department entered into settlement agreements with the petitioners whose entitlement to FLSA overtime had been established by the COFC. Those settlements gave each entitled employee two years of back overtime pay, without prejudice to their administrative claims still pending before GAO, which sought an additional four years of back wages consistent with the longer administrative statute of limitations. Complaint ¶ 13, JA25–26. Petitioners then requested a meeting with GAO "to discuss how to achieve a prompt resolution" of their pending administrative FLSA claims. *Id.* ¶ 14, JA26.

Instead, a week later, the Comptroller General overruled 16 years of settled GAO precedent and held that the statute of limitations for administrative FLSA claims was two years, not six. *In re Joseph M. Ford*, 73 Comp. Gen. 157 (1994). The Comptroller General also held that the

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[5] JA citations refer to the joint appendix filed in the Federal Circuit.

[6] On December 1, 2004, the COFC granted the motion for summary judgment as to liability filed by the GS-13 criminal investigators. *Adams v. United States*, No. 90-162C (Fed. Cl. Dec. 1, 2004) (unpublished).

shorter period would be applied retroactively to all cases then pending before GAO. *Id.* at 161–62.

Congress recognized the patent unfairness of GAO's retroactive application of *Ford*, and partially overruled it by statute. Section 640 of the 1995 Treasury, Postal Service and General Government Appropriations Act, Pub. L. No. 103-329, 108 Stat. 2382, 2432 (1994) ("Section 640"), which became law on September 30, 1994, provided that "the Comptroller General of the United States shall apply a 6-year statute of limitations to any claim of a Federal employee under the Fair Labor Standards Act of 1938 (29 U.S.C. § 201) for claims filed before June 30, 1994." Congress thus recognized that GAO's two-year statute of limitations should not be applied retroactively to claims pending when *Ford* was decided.

When petitioners renewed their efforts to resolve their administrative claims, GAO acknowledged that Section 640 had "modified our *Ford* decision to allow Federal employees to claim an entitlement to FLSA overtime for an additional four years, provided a claim was filed before June 30, 1994." *See* Complaint ¶ 21, JA28. GAO insisted, however, that its "regulations require that the agency from which the claim originated shall initially adjudicate the claim." *See id.*, JA28–29. Petitioners accordingly asked the relevant agencies to resolve the back pay claims. *Id.* ¶ 23, JA29–30. On January 27, 1995 the Deputy Assistant General Counsel of the Department of the Treasury circulated a memorandum concluding that Section 640 "gives specific authority to apply a six-year statute of limitations exclusively to the Comptroller General," not to the agencies themselves. *See id.* ¶ 24, JA30–31. By May 9, 1995, all of the relevant agencies had denied petitioners' claims on that ground. *Id.* ¶¶ 25–26, JA31.

By May 12, 1995, petitioners had appealed all of those agency decisions back to GAO under 4 C.F.R. § 31.4. Rather than act upon these indisputably meritorious appeals, however, GAO stalled to give the interested agencies time to lobby Congress for legislation extinguishing petitioners'

back pay claims. It simply did not respond to petitioners' letters (*see* Complaint ¶¶ 31, 33, JA34, 35), and counsel for GAO declared in another pending, similar case that GAO "does not intend to issue a decision . . . until the Treasury-Postal Service and General Government Appropriations Bill, 1996 . . . is enacted (because of the possible retroactive repeal of § 640 . . .)." Complaint ¶ 31, JA34. Various high-ranking government officials lobbied for the repeal of Section 640, *id.* ¶¶ 28–29, JA33, and the Treasury Department submitted proposed statutory language for Congress's consideration, *id.* ¶ 36, JA36.

Those efforts bore fruit on November 19, 1995, when Congress enacted Public Law No. 104-52, 109 Stat. 468, 468–69 (1995). This legislation amended Section 640 to provide that GAO's six-year statute of limitations "shall not apply to any claim where the employee has received any compensation for overtime hours worked during the period covered by the claim under any other provision of law, including, but not limited to, 5 U.S.C. § 5545(c), or to any claim for compensation for time spent commuting between the employee's residence and duty station." The 1995 statute reduced the administrative statute of limitations for practically all pending federal employee FLSA claims to two years—eliminating the government's obligation to pay four additional years' backpay—because the vast majority of entitled employees had received *some* compensation for their overtime hours under other provisions of law (at, or in many cases below, their regular hourly rate—not the time-and-a-half guaranteed by the FLSA) or were entitled to compensation for time they were required to spend driving to and from work in a government vehicle.[7]

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[7] Employees were entitled to compensation for this time when they were required to drive a government vehicle to and from work in order to be able to respond promptly to emergencies. *See* FPM Letter 551-10 (1976). They could drive such vehicles only for official purposes. *See, e.g.*, 31 U.S.C. §§ 1344, 1349(b); 41 C.F.R. § 101-38.301 (1998).

When Representative Lightfoot introduced the 1995 statute, he explained that without some change in the law the United States would owe its employees "as much as $460 million . . . for work done many years ago." 141 Cong. Rec. 32597 (1995). Representative Lightfoot justified the United States' repudiation of its debts to its employees by proclaiming that the bill would simply "give the Federal workers the same rights [i.e., a two-year statute of limitations] as their private sector counterparts." *Id.* (He did not acknowledge the trenchant difference that obviously motivated Congress in 1994—that federal employees, unlike their counterparts in the private sector, had long been on express notice from GAO and OPM that they had six years, rather than two, in which to assert their rights.)

**2. Procedural History**

Petitioners originally filed this action in the United States District Court for the District of Columbia. The District Court held that Congress's retroactive elimination of petitioners' claims was permissible under the Due Process Clause because it rationally furthered the legitimate purpose of equalizing the statutes of limitations governing FLSA claims of federal and other employees. Pet. App. 85a. It also held that the law did not effect a Taking. Pet. App. 87a. The D.C. Circuit affirmed the dismissal of petitioners' Due Process claims for the reasons stated by the District Court. Pet. App. 60a. The D.C. Circuit held that it lacked jurisdiction over petitioners' Takings claims, however. On remand, the District Court transferred the case to the COFC.

After transfer, the COFC dismissed petitioners' Takings claims. Noting the Federal Circuit's holding in *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1340 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 1096 (2002), that the Takings Clause is not implicated when the government imposes obligations to pay money on private parties, the COFC reasoned that "the case at bar is the very reverse—it is the government that is alleged to have an obligation to

pay money," and concluded that "this is a distinction without a difference." Pet. App. 40a.

The Federal Circuit affirmed. It acknowledged the settled law that contractual debts of the United States are property. Pet. App. 15a-16a. But it held that petitioners' right to overtime pay for work already performed is a purely *statutory* obligation, and that "no statutory obligation to pay money, even where unchallenged, can create a property interest within the meaning of the Takings Clause." Pet. App. 21a-22a. The Federal Circuit thought that conclusion required by Justice Kennedy's concurrence and Justice Breyer's dissent in *Eastern Enterprises*.

The Federal Circuit distinguished this Court's decision in *United States v. Larionoff*, 431 U.S. 864 (1977), as merely involving "enforcing a statutory entitlement to compensation for employment, not recognizing the predicate for a takings claim." Pet. App. 12a. The Federal Circuit failed to acknowledge that this Court had invoked the doctrine of constitutional doubt in *Larionoff*—interpreting the statute not to revoke a re-enlistment bonus for soldiers already entitled to it, to avoid the serious questions that such revocation would raise under the Takings Clause.

The Federal Circuit also recognized this Court's holding in *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885), that the statutes governing the pay of *State* employees create a unilateral contract that can be enforced against a State under the Contracts Clause once the work is performed. Pet. App 13a. It distinguished *Fisk* on the ground that it was "decided under the Contracts Clause, not the Takings Clause." Pet. App. 14a. The Federal Circuit did not reconcile that distinction with its earlier holding that petitioners' Takings claims fail only because petitioners' rights against the government are not contractual in nature.

Finally, the Federal Circuit distinguished *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), and *Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998)—

which held that the government's seizure of interest earned on a private bank account is a *per se* Taking—on the ground that monetary obligations can be property if they relate to a "fund of money," but not if they are "ordinary obligation[s] to pay money." Pet. App. 21a.

## REASONS FOR GRANTING THE WRIT

The Federal Circuit held that the United States can withhold and confiscate the wages it owes petitioners (and the rest of its military and civilian employees) for work they have already performed, so long as Congress's reason for confiscating their wages satisfies Due Process review. It reached that extraordinary conclusion for several reasons.

*First*, the Federal Circuit held that federal employees' right to receive wages for work already performed is merely a statutory expectation akin to welfare recipients' expectation that they will continue to receive welfare checks in the future. That premise is wrong. This Court has squarely held that the statutory pay owing to State employees becomes a constitutionally protected *contractual* right once the work has been performed. There is no legal reason the earned pay of federal employees should be different. Indeed, when faced in *Larionoff* with a statutory amendment that appeared to withdraw a statutory re-enlistment bonus from soldiers who had already agreed to re-enlist, this Court invoked the doctrine of constitutional doubt to avoid that interpretation, citing cases holding that the United States cannot abrogate its *contractual* debts.

*Second*, even if petitioners' right to their earned wages were not contractual for constitutional purposes, the Federal Circuit erred by holding that "no statutory obligation to pay money, even where unchallenged, can create a property interest within the meaning of the Takings Clause." Pet. App. 21a-22a. This Court has never held that vested statutory entitlements can be confiscated without compensation, even when gratuitous. This Court certainly has not permitted the abrogation of statutory debts that rest on an explicit *quid pro quo*, like the wages at

issue here. Benefits promised by statute, and exchanges for value offered by statute, can always be modified *prospectively*. But they cannot be divested once earned.

The Federal Circuit concluded that statutes can never create property rights based on language in Justice Kennedy's concurrence and Justice Breyer's dissent in *Eastern Enterprises*, which the Federal Circuit treated as a holding. That rationale deepens an existing circuit split over whether *Eastern Enterprises* contains any holding of this Court at all. Regardless, the Federal Circuit missed the point of the language it cites. Justice Kennedy and the four dissenters argued that Takings review was redundant because, on the facts of *Eastern Enterprises*, the applicable Due Process and regulatory Takings tests would ask the same question: was the law fundamentally fair? But laws abrogating the United States' own obligations are not governed by the *regulatory* Takings test at all; this Court has consistently held that they are *per se* Takings. *Per se* Takings jurisprudence certainly is not identical to Due Process review, so Justice Kennedy's and Justice Breyer's reasoning does not apply here.

*Third*, the Federal Circuit held that monetary obligations can be property only if they relate to a "fund of money," but not if they are "ordinary obligation[s] to pay money." Pet. App. 21a. That conclusion is also based on a misunderstanding of *Eastern Enterprises*. Justices Kennedy and Breyer referenced the fact that *Webb's* and *Phillips* involved "fund[s] of money" (i.e., private bank accounts) in the course of distinguishing them from *Eastern Enterprises*. But their point was that the statutes in *Webb's* and *Phillips* had seized specific, pre-existing monetary debts (a bank's obligation to pay interest to its depositors) for the government's own use, whereas the statute in *Eastern Enterprises* imposed a new regulatory obligation to pay money from one private citizen to another. Nothing in Justice Kennedy's concurrence or Justice Breyer's dissent suggests that they would have endorsed the Federal Circuit's new rule—that specific, pre-existing debts owed by

*banks* are property, but specific, pre-existing debts owed by the federal government are not.

The Federal Circuit's opinion in this case deprives thousands of federal employees of the back wages they are legally owed, transforms the basic relationship between the United States and its nearly four million employees, and seriously distorts the holdings of at least eight decisions of this Court. And when combined with the D.C. Circuit's parallel holding in this case—that laws of this nature are subject merely to rational basis review under the Due Process Clause—the Federal Circuit's new rules produce results that this Court would clearly reject.

Every Justice of this Court concluded in *Eastern Enterprises* that retroactive legislation must be *fundamentally fair* as well as rational. But since this Court divided over whether its analysis should be located in the Takings or Due Process Clause, *Eastern Enterprises* technically produced no binding holding under either Clause. That gap permitted the D.C. and Federal Circuits to conclude in this case that laws altering or imposing monetary obligations can be reviewed only under the Due Process Clause, and that the appropriate test is merely rational basis. Under that reasoning, the statute at issue in *Eastern Enterprises* would be reviewed only for minimum rationality—the position that this Court *unanimously* rejected.

## I. PETITIONERS' CONTRACTUAL RIGHT TO EARNED WAGES CANNOT BE ABROGATED WITHOUT JUST COMPENSATION

The Federal Circuit held that petitioners' right to their earned wages is a mere statutory expectation that can be revoked by statute with no constitutional consequences. That is patently incorrect. Those wages became a vested contractual right once the requisite work was performed, and the confiscation of that right was a Taking for which compensation is due.

### A. Laws Abrogating Contractual Debts Of The United States Result In *Per Se* Takings

For more than a century this Court has held that "Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money."[8] Such obligations are often assumed by contract, and the general rule is that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934). *Lynch* held that, despite the financial exigencies of the Great Depression, the United States could not cancel war risk insurance policies issued under statutory authority to World War I veterans and their families. "The Fifth Amendment commands that property be not taken without just compensation," this Court concluded, and "[r]ights against the United States arising out of a contract with it are [property] protected by the Fifth Amendment." *Id.* Therefore, "Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." *Id.* at 580. Another case of the same era held that Congress could not nullify the gold-standard clauses of the United States' public bonds. *See Perry v. United States*, 294 U.S. 330 (1935).

The federal government's abrogation of its own contractual debts is a classic *per se* Taking of private property for the government's "own use," not a regulatory measure incidentally impairing the value of property left in private hands.[9] That is how *Lynch* and *Perry* were

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[8] *Bowen v. Pub. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 55 (1986); *see Sinking-Fund Cases*, 99 U.S. 700 (1878).

[9] The basic divide in this Court's Takings cases is between the "'classi[c] taking' in which the government directly appropriates private property for its own use," and regulatory measures which merely "prohibit a property owner from making certain uses of her private property" and thereby diminish the *value* of property left in private hands. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-23 (2002) (citation omitted). "When the government

analyzed, even though both came well after the birth of regulatory Takings jurisprudence in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). And the government certainly had rational bases for trying to abrogate its debts in those cases, but this Court treated those reasons as irrelevant.[10]

### B. The Statutory Pay Owing To Federal Employees Becomes A Contractual Debt Once The Requisite Work Is Performed

The Federal Circuit acknowledged the settled law described above, but held that these federal employees had no contract with the United States that could be abrogated.

That is patently incorrect. When, as here, the terms of employment are set by statute, federal employees certainly cannot sue the United States for breach of contract claiming that their supervisors promised them more than the statute provides.[11] But that does not mean that federal employees have no contractual right to receive the statutory pay they are owed *for work already performed.* To the contrary, the statutes governing federal employment offer a unilateral

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physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Id.* Regulatory measures that merely decrease the value of property left in private hands are evaluated under a balancing test that focuses on the character of the regulation, its economic impact, and whether it interferes with investment-backed expectations. *See, e..g., Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

[10] For instance, this Court conceded in *Lynch* that in "all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress." 292 U.S. at 580. And in *Perry* the United States abrogated the gold standard clauses of its own bonds in the course of broadly prohibiting *all* payment in gold clauses. 294 U.S. at 349.

[11] The Federal Circuit seems to have been invoking this principle when it observed that federal employees cannot rely on oral promises or other "government-fostered expectations" to claim benefits *inconsistent* with the statutes governing their employment. Pet. App. 15a. But petitioners are not seeking to hold the government to promises inconsistent with the statutes; they are seeking to enforce promises *made under those statutes.*

contract that becomes complete once the employee does the work.

This Court explained that distinction in *Fisk*, in which a Louisiana parish refused to pay the purely statutory wages owed to a district attorney for work already performed. This Court recognized that the statutes governing his employment implied "no contract which forbids the legislature or other proper authority to change the rate of compensation for salary or services *after the change is made*, though this may include a part of the term of the office then unexpired." *Fisk*, 116 U.S. at 133-34 (emphasis added). But the Court squarely held that those statutes *did* create a vested contractual obligation of the State to pay the wages promised by statute *for work already performed*: "[A]fter the services have been rendered, under a law, resolution, or ordinance which fixes the rate of compensation, there arises an implied contract to pay for the services at that rate. This contract is a completed contract." *Id.* This Court held that "[t]his obligation can no more be impaired by a law of the State than that arising on a promissory note." *Id.* at 134.

The Federal Circuit tried to distinguish *Fisk* on the grounds that it was decided under the Contracts Clause. But that is precisely the point. This Court held that a purely statutory obligation to pay wages *became* a contractual entitlement once the work was completed. Otherwise the Contracts Clause would not have applied at all. (There was no need to consider any Takings issue in *Fisk* because the Contracts Clause independently forbids States from abrogating their contracts.) That holding destroys the Federal Circuit's attempt to distinguish this case from cases like *Lynch* and *Perry* on the ground that this case does not involve "contractual" rights.

This case is exactly like *Fisk*, except that the employer here is the United States rather than an individual State. There is no reason the earned statutory pay of State employees should give rise to a unilateral contract but the earned statutory pay of *federal* employees can be revoked at

will.[12] Until now this Court has not been required to say so definitively, but in *Larionoff* it invoked the doctrine of constitutional doubt to avoid the "grave and doubtful constitutional questions" that would be raised by a law eliminating the pay owing to federal employees for work already performed.[13]

*Larionoff* interpreted a statutory amendment that could have been read to withdraw a reenlistment bonus, promised by statute, from soldiers who had already committed to reenlist. This Court acknowledged that a "'soldier's entitlement to pay is dependent upon statutory right,'" and that "accordingly the rights of the affected service members must be determined by reference to the statutes and regulations . . . rather than to ordinary contract principles." *Larionoff*, 431 U.S. at 869 (citation omitted). But, citing *Lynch* and *Perry*, this Court recognized that denying federal employees their fully earned *statutory* compensation for services already performed would raise the same constitutional concerns as abrogating any ordinary contractual debt:

> Of course, if Congress had such an intent, serious constitutional questions would be presented. No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn. It is quite a different matter, however, for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would

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[12] The States are sovereign entities no less than the federal government, and their internal relationship with their employees is fundamentally the same. This Court has also recognized that the values underlying the Takings and Contracts clauses are similar, and that the Fifth Amendment stands in for the Contracts Clause to a substantial extent in federal cases. *See Sinking-Fund Cases*, 99 U.S. at 718–19.

[13] That articulation of the constitutional doubt test is from *United States ex rel. Attorney Gen'l v. Del & Hudson Co.*, 213 U.S. 366, 408 (1909).

> appear in a different constitutional light. Cf. *Lynch v. United States*, 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935).

*Larionoff*, 431 U.S. at 879 (citation omitted). In order to avoid those serious constitutional difficulties, this Court interpreted the statute in a way that did not eliminate the vested rights of soldiers who had already agreed to reenlist.

The Federal Circuit dismissed *Larionoff* as "inapposite" because it "involve[d] enforcing a statutory entitlement to compensation for employment, not recognizing the predicate for a takings claim." Pet. App. 12a. But *Larionoff* was decided on statutory grounds only because this Court, after invoking constitutional doubt, interpreted the statute to preserve the bonus for those soldiers who had already re-enlisted. This Court's reasoning makes it clear that, if the statute *had* withdrawn the bonus from soldiers entitled to it, then the Takings Clause would have been implicated. That is why this Court cited *Lynch* and *Perry*. As the Court of Appeals in *Larionoff* recognized, "once someone agrees to perform certain services in exchange for a given sum of money, and the Government has received that performance . . . the 'gratuity' becomes a contractual right." *Larionoff v. United States*, 533 F.2d 1167, 1189 (D.C. Cir. 1976). Lower courts in the years since *Larionoff* have consistently followed this Court in assuming that abrogation of such rights would be a Taking, and have interpreted statutes to avoid that result.[14]

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[14] In *Cherry v. United States*, 640 F.2d 1184 (Ct. Cl. 1980), the Federal Circuit's predecessor cited *Lynch* when interpreting a military pay statute to preserve wages already earned. "To tamper with [servicemen's right to their pay] by legislation, especially with respect to pay already accrued, would raise serious fifth amendment issues, as it might be held to constitute a taking." *Cherry*, 640 F.2d at 1187. And in *Costello v. United States*, 587 F.2d 424, 425 (9th Cir. 1978), *cert. denied*, 442 U.S. 929 (1979), the court noted that "[a]s to vested rights, the distinction between earned military pay and that to be earned in the future has long been recognized." The court proceeded "on the assumption, arguendo, that if retirement pay had been fully earned at the date of retirement it could not be divested without compensation." *Id.* at

Under the FLSA, petitioners "became absolutely entitled to the money when they worked the overtime."[15] They are therefore in precisely the same position as the district attorney in *Fisk* and the soldiers in *Larionoff*. The back wages the United States owed them were a contractual debt, and the law nullifying those debts was—as in *Lynch* and *Perry*—a *per se* Taking.[16]

## II. STATUTORY DEBTS ARE PROPERTY PROTECTED BY THE TAKINGS CLAUSE

The Federal Circuit compounded its error by holding that "no statutory obligation to pay money, even where unchallenged, can create a property interest within the meaning of the Takings Clause." Pet. App. 21a-22a. That holding is an arbitrary limitation on the power of Congress. Property rights, including property rights to money, can certainly be created by federal statutes. The Federal

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427 n.2; *see also, e.g., Am. Fed'n of Gov't Employees v. Campbell*, 474 F. Supp. 357, 360 (D.D.C. 1979) ("[F]or this Court to allow defendants to deprive plaintiffs of pay due for services already performed but still owing would present serious Constitutional questions."), *aff'd in part, rev'd in part on other grounds*, 659 F.2d 157 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 820 (1981); *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 633 F. Supp. 511, 514 n.2 (D.D.C. 1986) (Congress "could not retroactively reduce the rate of pay for work already performed. [That] holding rests entirely upon a quid-pro-quo concept . . . ."), *aff'd*, 479 U.S. 878 (1986).

[15] *Donovan v. Sovereign Sec., Ltd.*, 726 F.2d 55, 58 (2d Cir. 1984); *see also, e.g., Cook v. United States*, 855 F.2d 848, 851 (Fed. Cir. 1988) ("[A] claim for unpaid overtime under the FLSA accrues at the end of each pay period when it is not paid.").

[16] The fact that the statute rendered those debts unenforceable by retroactively shortening the statute of limitations, instead of simply nullifying the debts, does not change the analysis. *See, e.g., Texaco, Inc. v. Short*, 454 U.S. 516, 528 (1982) ("when the practical consequences of extinguishing a right are identical to the consequences of eliminating a remedy, the constitutional analysis is the same."). This Court held in *Armstrong v. United States*, 364 U.S. 40 (1960), for example, that the government committed a Taking when its acquisition of a ship rendered liens held against that ship unenforceable for sovereign immunity reasons. The fact that the specific amounts petitioners are owed have not yet been calculated is also immaterial. The same was true in *Lynch*, *Perry*, *Webb's*, and *Phillips*.

Circuit's holding to the contrary is based on a misunderstanding of Justice Kennedy's concurrence and Justice Breyer's dissent in *Eastern Enterprises*.

### A. Federal Statutes Can Create Property, Including Property In Monetary Obligations

This Court has held that the "property" protected by the Takings Clause is "'created and . . . defined by existing rules or understandings that stem from an independent source such as state law.'" *Webb's*, 449 U.S. at 161 (citation omitted). Federal statutes are no less potent than state common law in that regard. This Court has recognized, for example, that intellectual property created by statute, like patents and trademarks, is property protected by the Takings Clause.[17]

Of course, the usual presumption is that statutes are "'not *intended* to create private contractual or vested rights but merely declare[] a policy to be pursued until the legislature shall ordain otherwise.'" *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466 (1985) (*quoting Dodge v. Bd. of Educ.*, 302 U.S. 74, 79 (1937)) (emphasis added). But that presumption can be overcome if the statutory language or context fairly imply an intent by Congress to grant vested rights. *Dodge* indicated, for example, that a statute that "confirms a settlement of disputed rights and defines its terms" meets that threshold. 302 U.S. at 79. And this Court held in *Fisk* that statutes establishing the wages of public employees are intended to create binding rights which vest once the work is performed. Indeed, even gratuitous statutes create vested rights once a particular payment has been made, or become due. This Court has held that Congress can modify

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17 "That a patent is property, protected against appropriation both by individuals and by government, has long been settled." *Hartford-Empire Co. v. United States*, 323 U.S. 386, 415 (1945). *See also, e.g., College Savs. Bd. v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) (trademarks "are the 'property' of the owner because he can exclude others from using them.").

Social Security payments going forward, for example, *see Flemming v. Nestor*, 363 U.S. 603 (1960), but has never suggested that those payments are not property once recipients are entitled to receive them.[18]

### B. *Eastern Enterprises* Does Not Hold That Statutory Obligations To Pay Money Are Immune From Takings Scrutiny

*Eastern Enterprises* does not speak to, much less overrule, the settled law that the government must pay just compensation if it abrogates its debts.

In *Eastern Enterprises*, this Court considered a statute that forced coal mine operators to cover medical expenses for miners and their dependents, including miners who had worked for other companies now defunct. A plurality opinion written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Scalia and Thomas concluded that the statute went too far in its retroactive impact, and was therefore a regulatory Taking under *Penn Central*.

A dissenting opinion written by Justice Breyer and joined by Justices Stevens, Souter, and Ginsburg argued that regulatory measures imposing an obligation on one private party to pay money to another private party should be analyzed only under the Due Process Clause. Their point was that such laws are constitutional only if the parties on whom liability is imposed are *responsible*, in some real sense, for the costs they are being asked to bear. If not, the law will fail Due Process; if so, it could never have the "character" of a regulatory Taking under *Penn Central*. Thus in their view the Takings Clause adds nothing useful to the constitutional analysis. The dissenters concluded that the Coal Act was not "fundamentally unfair," in part

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[18] *See, e.g., Brown v. Legal Found. of Washington*, 538 U.S. 216, 247 (2003) (Scalia, J., dissenting) ("May the government now seize welfare benefits, without paying compensation, on the ground that there was no 'net loss' to the recipient?") (citation omitted); *id.* at 252 ("[T]he rationale supporting today's judgment—what the government hath given, the government may freely take away—would be disastrous.").

because the coal companies had fostered an expectation that they would cover retiree health costs. *Eastern Enterprises*, 524 U.S. at 558-59. The dissenters were careful to clarify, however, that because the statutory liability in question flowed "not to the Government, but to third parties," the case could not have raised *per se* Takings questions. *Id.* at 555.[19]

Justice Kennedy agreed with the dissenters that regulatory Takings analysis adds nothing to Due Process review in cases involving the imposition of monetary liability from one private party to another.[20] (Like the dissenters, he was careful to distinguish *per se* Takings cases in which "the government physically acquires property for itself." *Id.* at 542.) Justice Kennedy concluded, however, that the Coal Act was unfairly retroactive and violated Due Process. This Court therefore split 4-4-1, and struck down the Coal Act without agreeing on any rationale.

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[19] They argued that "[t]his case involves not an interest in physical or intellectual property, but an ordinary liability to pay money, *and not to the Government, but to third parties.*" 524 U.S. at 554 (emphasis added). And when distinguishing *Webb's*, they stressed that "the monetary interest at issue there arose out of the operation of a specific, separately identifiable fund of money. *And the government took that interest for itself.*" *Id.* (emphasis added). In the case before them, by contrast, they emphasized that "there is no specific fund of money; there is only a general liability; and that liability runs not to the Government, but to third parties." *Id.*

[20] Like Justice Breyer, Justice Kennedy reasoned that the constitutionality of such statutes ultimately depends on a "normative judgment" concerning whether those parties are genuinely responsible for the regulatory problem Congress is trying to fix, and that regulatory Takings scrutiny would simply duplicate the Due Process analysis. *Id.* at 545 (Kennedy, J., concurring). Justice Kennedy, even so, did not categorically foreclose the use of regulatory Takings analysis in cases involving imposition of monetary liability. "My reading of *Connolly*, and *Concrete Pipe*, is that we should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible." 524 U.S. at 546 (Kennedy, J., concurring).

In *Commonwealth Edison*, the Federal Circuit treated the shared reasoning of Justice Kennedy and the dissenters as a holding, and concluded that no law "impos[ing] an obligation to pay money" can be a Taking, even if the money is to be paid to the government. *Commonwealth Edison*, 271 F.3d at 1339-40. In this case the Federal Circuit took a further unwarranted step and held that a law nullifying the government's debts to private individuals is not a Taking either. Pet. App. 22a.

The Federal Circuit's reasoning is profoundly mistaken. First, extracting a holding from Justice Kennedy's concurrence and four other Justices' *dissent* is improper. Divided opinions produce holdings only if a "narrowest grounds" for the decision can be gleaned from the opinion of a Justice concurring in the relevant judgment. *Marks v. United States*, 430 U.S. 188 (1977). Tallying votes from concurring and dissenting opinions is reading tea leaves instead of faithfully applying this Court's precedents. This Court has repeatedly instructed the lower courts to avoid such speculation. The Federal Circuit's exacerbation of a deep and acknowledged circuit split over the precedential status of *Eastern Enterprises* is reason enough for this Court to grant review, given the implications of that dispute for this critical area of the law.[21]

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[21] Like the Federal Circuit, the First Circuit has held that *Eastern Enterprises* has precedential effect on Takings Clause claims. *See Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys.*, 173 F.3d 46, 58 (1st Cir. 1999) (holding that plaintiffs asserting a Takings Clause claim must establish an independent property right because "a majority of justices . . . concluded that a Takings Clause issue can arise only after a plaintiff's property right has been independently established"). However, the Second, Third, Fourth, Sixth, and D.C. Circuits have held that *Eastern Enterprises* either has no precedential effect, or that its holding is limited to similarly situated plaintiffs. *See United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 189 (2d Cir. 2003); *Anker Energy Corp. v. Consol. Coal Co.*, 177 F.3d 161, 170 (3d Cir. 1999); *A.T. Massey Coal Co., Inc. v. Massanari*, 305 F.3d 226, 237 (4th Cir. 2002); *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d

More importantly, the Federal Circuit misunderstood Justice Kennedy's and Justice Breyer's reasoning. Their point was that a law imposing liability on one private party to benefit another private party is at most a *regulatory Taking* and therefore governed by the *Penn Central* test. They reasoned that such a law that passed Due Process review could never fail *Penn Central*, because both doctrines would be asking the same question: is it fundamentally fair to hold the former party responsible for the loss? But as both Justice Kennedy and the dissenters were careful to point out, that reasoning has no application to classic *per se* Takings cases, like this one, in which the government "acquires property for itself." 524 U.S. at 542 (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting).

In *per se* cases, Takings jurisprudence diverges considerably from Due Process analysis: the "character" of the government's action is irrelevant. It must pay compensation regardless of the reason for the seizure. The concurring and dissenting opinions in *Eastern Enterprises* did not question that principle. By reading those opinions to hold that the government is free to abrogate its own debts without paying compensation, the Federal Circuit reached a conclusion that no Justice in *Eastern Enterprises* favored, and which conflicts with almost a century of settled law.

## III. SPECIFIC, EXISTING MONETARY DEBTS ARE PROPERTY REGARDLESS OF WHETHER THEY RELATE TO A "FUND OF MONEY"

The Federal Circuit also held that an "ordinary obligation to pay money" is not property because it is not a "fund of money." That distinction makes no sense and is inconsistent with settled law.

The Federal Circuit derived this holding from an additional misunderstanding of the concurrence and dissent in *Eastern Enterprises*. Justice Kennedy's concurrence

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534, 552 (6th Cir. 2001); *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255 (D.C. Cir. 1998).

suggested that the Takings Clause might not apply because the Coal Act did not "target[] a specific property interest [or] depend[] upon any particular property for the operation of its statutory mechanisms." *Eastern Enterprises*, 524 U.S. at 543. The dissent similarly argued that, whereas the property at issue in *Webb's* "arose out of the operation of a specific, separately identifiable fund of money," in *Eastern Enterprises* "there is no specific fund of money; there is only a general liability; and that liability runs not to the Government, but to third parties." *Id.* at 555 (Breyer, J., dissenting).

As noted above, those opinions do not declare a holding of this Court. And neither opinion ultimately reaches any conclusions under the Takings Clause.[22] More importantly, however, both opinions were simply distinguishing the Coal Act—which imposed a new monetary obligation on one private party to benefit another private party in the service of a regulatory objective—from the statutes in *Webb's* and *Phillips*, which seized specific, pre-existing monetary debts for the government's own use. As the rest of their opinions make clear, the critical points for Justice Kennedy and the dissenters were that no pre-existing debt was seized by the Coal Act, and that the government did not take anything for itself. The Federal Circuit nonetheless has reached the untenable conclusion that even confiscating a specific pre-existing debt for the government's own use is not a Taking unless the debt relates somehow to a "fund of money."

That conclusion makes no sense. The statute in this case "target[s] a specific property interest [and] depend[s] upon . . . particular property for the operation of its statutory

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[22] Justice Kennedy ultimately concluded that "we should proceed first to general due process principles, reserving takings analysis for cases where the governmental action is otherwise permissible." *Id.* at 546. Since he concluded the Coal Act failed Due Process, he did not need to reach the Takings issue. Justice Breyer similarly concluded that he "need not face the[] difficulties" associated with whether the Takings Clause applied to laws like the Coal Act, because it would simply duplicate the Due Process analysis in any event. *Id.* at 556.

mechanisms" in exactly the same way as did the statutes in *Webb's* and *Phillips*. The property seized in *Webb's* and *Phillips* was simply a bank's obligation to pay depositors interest attributable to their deposits—or, alternatively, the depositors' claims against the bank for those funds. In other words, an ordinary monetary debt. Even the underlying deposits or accounts were nothing more than debts owed by the bank to its depositors. (Banks of course do not keep deposits physically in separate piles in a vault; they aggregate deposits and loan funds to others.) Yet the Federal Circuit has apparently concluded that while debts owed by banks are property, debts owed by the United States (and presumably ordinary debts owed by other non-banks) are not. That distinction is untenable, serves no coherent constitutional purposes, and clearly is not what either Justices Kennedy or Breyer intended.

The Federal Circuit's test also unjustifiably rewards the United States for being a deadbeat debtor. Presumably if the United States had sent these employees checks for their overtime and then stopped payment, or if it had paid the money owed into court as an appeal bond or interpleader fund (as in *Webb's*) and then passed a statute appropriating that deposit for itself, the Federal Circuit would have acknowledged the existence of a disputed "fund of money." But the only reason petitioners' money remains commingled within the general federal treasury is that the United States has defied its lawful obligations. This Court has never held that a debt must be paid before seizing it can be a Taking. The obligations in *Lynch*, *Perry*, *Webb's*, and *Phillips* had not been paid, or even *adjudicated*.[23] And this Court has recognized that a chose in action (like petitioners' claims for the back wages owed them in this case) is property even if

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[23] Of course, petitioners' entitlement to these wages *has* largely been adjudicated successfully in the COFC. *See infra*, at 4 n.3, 5 and n.6. The Federal Circuit's suggestion that petitioners had only a "bald allegation" that they were owed the money, Pet. App. 17a, is therefore erroneous. In addition, the procedural posture here requires the assumption that petitioners' claims are meritorious and that the money is owed.

not yet reduced to judgment.[24] The point is that, ultimately, this case *does* involve a specific "fund of money"—a fund that the United States is now using for its own benefit, and that has not been reduced to a sum certain only because of the United States' intransigence.[25]

Justice Kennedy and the dissenters in *Eastern Enterprises* faced a difficult conceptual problem. Laws imposing new monetary obligations on private parties, in the service of a regulatory objective, do not fit easily into the regulatory Takings framework because their constitutionality ultimately depends on the fairness of the law rather than its economic impact. But that problem is not presented here. In this case, the government has confiscated its specific, pre-existing monetary debts for its own use. The sole distinction between this case and *Webb's* and *Phillips* is that here the debts were owed by the United States itself. But, as *Lynch* and *Perry* teach, that is a distinction without a difference. The naked self-dealing evident when the United States nullifies its own debts for wages earned makes it even clearer that a compensable *per se* Taking has occurred.[26]

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[24] *See Cities Servs. Co. v. McGrath*, 342 U.S. 330, 335-36 (1952); *Ware v. Hylton*, 3 U.S. 199 (1 Dall.) (1796). Causes of action may in most cases be sold, assigned, pledged as security, or abandoned like any other property, and they are treated as the property of a bankrupt's estate, to be divided among creditors like any ordinary asset. *See, e.g.*, 11 U.S.C. § 541(a)(1); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 204–05 & n.9 (1983).

[25] As this Court has noted, the FLSA requires employers "to keep proper records of wages, hours and other conditions and practices of employment," and it is employers like the United States "who [are] in [the] position to know and to produce the most probative facts concerning the nature and amount of work performed." *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). On remand, the COFC may direct the United States to produce "any information or papers" necessary to determine the precise amount owing to petitioners. 28 U.S.C. § 2507(a).

[26] "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements." *Perry*, 294 U.S. at 350-51. In *United States Trust Co. of New York v. New*

## IV. ALTERNATIVELY, THIS COURT SHOULD REVERSE ON DUE PROCESS GROUNDS

If this Court agrees with the Federal Circuit that laws of this nature cannot be Takings, it should nevertheless vacate the D.C. Circuit's dismissal of petitioners' Due Process claims. That court erred in applying the lenient rational basis standard to the United States' abrogation of its own debts.[27]

Although various Justices disagreed in *Eastern Enterprises* about whether the case should be analyzed as a Due Process or Takings issue, this Court displayed remarkable unanimity on the substantive standard. The plurality's Takings analysis and the Due Process test articulated by Justice Kennedy and the dissenters all focused on whether the retroactive burdens imposed by the law were fundamentally fair in light of Eastern's past

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*Jersey*, 431 U.S. 1, 26 (1977), this Court adopted a heightened standard of review under the Contracts Clause when a State impairs its own contracts, because "deference to a legislative assessment of reasonableness and necessity is not appropriate [when] the State's self-interest is at stake." This Court also recognized that *Perry* had "[f]or similar reasons" applied "a dual standard of review . . . under the Fifth Amendment to federal legislation abrogating [the federal government's own] contractual gold clauses." *Id.* at 26 n.25 (citing *Perry*, 294 U.S. at 350–51); *see also United States v. Winstar Corp.*, 518 U.S. 839, 894 n.38 (1996) (plurality op.) (same). Most recently, the *Winstar* plurality suggested that the government has no contract defense of impossibility of performance "where a substantial part of the impact of the Government's action rendering performance impossible falls on its own contractual obligations," 518 U.S. at 898, because such action is "tainted by a governmental object of self-relief...." *Id.* at 896. This Court's frequent recognition that "the Government's self-enrichment may make it all the more evident a taking has occurred" is at one with the consistent jurisprudence described above. *Eastern Enterprises*, 524 U.S. at 544 (Kennedy, J., concurring); *see also id.* at 555 (Breyer, J., dissenting) (distinguishing *Webb's* on the ground "the government took that interest for itself," whereas the liability imposed by the Coal Act "runs not to the Government, but to third parties").

[27] These issues are discussed in greater depth in the separate Due Process petition, but are also included herein as a precaution in case this Court determines that a unified petition was the appropriate course.

relationship to the problem Congress was trying to solve. No Justice believed that the Coal Act could be constitutional merely because it "had a legitimate legislative purpose which was furthered by rational means." Pet. App. 61a. Under that standard, the statute in *Eastern Enterprises* plainly would have been upheld.[28] And Justices Kennedy and Breyer reasoned that Takings review was unnecessary *precisely because* they applied a Due Process test substantially more stringent than rational basis.

Petitioners respectfully submit that if the D.C. Circuit had applied the test articulated by Justice Kennedy and the dissenters in *Eastern Enterprises*, it would have concluded that the 1995 statute violated Due Process. That statute had a severe retroactive effect on petitioners, and they are in no way responsible for the "problems" that the statute was designed to solve. Rational basis review was also inappropriate in this case for two additional reasons. This Court has held that laws retroactively shortening statutes of limitations are *per se* Due Process violations unless they provide a grace period in which claims previously accrued may be filed.[29] This statute did not do so. This Court's precedents also suggest that the deference to legislative judgments implicit in the ordinary rational basis standard is inappropriate when a statute modifies the United States' own proprietary obligations, *supra* at 26 n.26.

## V. THIS CASE RAISES ISSUES OF NATIONAL IMPORTANCE

This case presents questions of great national importance. The United States employs nearly four million people on statutory terms, with a total payroll of nearly $200

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[28] Providing health benefits to retirees was certainly a legitimate purpose, and the means chosen (imposing financial liability on former employers), were certainly rational, in the normal sense of a good fit between means and ends. The Coal Act was *unfair*, not *irrational*.

[29] *See, e.g., Ochoa v. Hernandez Y. Morales*, 230 U.S. 139, 161-62 (1913); *Atchafalaya Land Co. v. F.B. Williams Cypress*, 258 U.S. 190, 196-97 (1922); *Block v. North Dakota E. Rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 286 n.23 (1983); *Texaco*, 454 U.S. at 527 n.21.

billion annually.[30] The Federal Circuit held that the United States can retroactively abrogate its obligations to pay wages earned by those employees, for work already performed, without paying just compensation. This case alone involves more than 14,000 federal employees, mostly law enforcement officers, who have been denied back pay that they are entitled to receive. These are contractual debts no less binding on the United States than its Treasury bonds.

The Federal Circuit's arbitrary and formalistic monetary Takings jurisprudence "expand[s] the Government's opportunities for contractual abrogation" and therefore will have the "certain result of undermining the Government's credibility at the bargaining table and increasing the cost of its engagements."[31] More broadly, the Federal Circuit has derived an entirely new jurisprudence of monetary Takings from misunderstood language in recent concurring and dissenting opinions of this Court. That jurisprudence seriously distorts the holdings of at least eight actual decisions of this Court closely on point: *Fisk*, *Lynch*, *Perry*, *Larionoff*, *Webb's*, *Phillips*, *Brown*, and *Eastern Enterprises*. The Federal Circuit made it clear *en banc* in *Commonwealth Edison* that it considers itself bound by its reading of *Eastern Enterprises*, and will not reconsider its doctrine. There is a square and acknowledged

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[30] *See* http://www.dior.whs.mil/mmid/L03/fy03/ATLAS_2003.pdf (last visited February 25, 2005) (military payroll); http://www.opm.gov/feddata/html/2004/september/table4.asp (last visited February 25, 2005) (civilian payroll).

[31] *Winstar*, 518 U.S. at 884 (plurality op.); *see also Lynch*, 292 U.S. at 580 ("Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors."); *Sinking-Fund Cases*, 99 U.S. at 720–21. The potential costs of decreased confidence in the Nation's commitments to pay its debts is staggering; a mere one percent increase in the interest rate that Treasury Bill creditors demand to compensate them for the risk of government default would alone cost the United States $77 billion per year. *See* http://www.publicdebt.treas.gov/opd/opdpenny.htm (last visited February 18, 2005) (enumerating the National debt).

split on the precedential status of *Eastern Enterprises* and, because the Federal Circuit has exclusive jurisdiction over substantial Takings claims against the United States, a split on the merits of the Takings issue is unlikely to develop.[32]

These Takings questions clearly merit this Court's attention, and can be reviewed independently. But petitioners submit that granting review on the Due Process issues as well would aid this Court's consideration of the broader jurisprudential issues. Indeed, the whipsaw that occurred in this case illustrates the critical need for this Court's intervention. The D.C. Circuit, like almost all the lower courts, has concluded that *Eastern Enterprises* contains no holding that could modify the traditional rational basis test under the Due Process Clause. But the Federal Circuit has concluded that *Eastern Enterprises* exempts statutes altering or imposing monetary obligations from any form of Takings scrutiny. The net result is that if the Coal Act were challenged tomorrow it would be subjected to nothing more searching, under either Clause, than Due Process rational basis review. This Court rejected that position *unanimously* in *Eastern Enterprises*.

## CONCLUSION

This petition should be granted, or it and the separate petition challenging the Due Process issues should be granted and consolidated for argument.

Respectfully submitted,

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[32] Although cases involving State employee compensation could be litigated in other circuits, those cases would clearly be governed by *Fisk* under the Contracts Clause.

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